



The Scottish Parliament  
Pàrlamaid na h-Alba

James Dornan MSP  
Convener  
Local Government and Communities Committee  
c/o Clerk to the Committee

By email: [LocalGovernmentandCommunities@parliament.scot](mailto:LocalGovernmentandCommunities@parliament.scot)

cc. Aileen Campbell MSP, Cabinet Secretary for Communities and Local Government

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Dear James

### **European Charter of Local Self-Government (Incorporation) (Scotland) Bill**

In the course of Stage 1 of my Member's Bill I have become aware that there is a gap in the Explanatory Notes. If my Bill were to pass, I would seek to add a paragraph of explanation to a revised set of Explanatory Notes. I felt it important for the purposes of transparency to indicate my intention to do so to the Committee, during its deliberations.

By way of explanation, this relates to the scenario where a court decides that a provision of subordinate legislation is incompatible with the Charter, and where primary legislation does not prevent the removal of the incompatibility.

Currently, paragraph 14 of the Explanatory Notes explains that, in a situation where Charter-incompatible subordinate legislation was made after the Bill comes into force, such a decision could be considered a breach of the section 2 duty on Scottish Ministers to act compatibly with the Charter. As a consequence, and depending on the circumstances, the court may be able to reduce the instrument.

However, the Explanatory Notes do not explain what happens in the case of subordinate legislation made before the Bill comes into force.

In practice this will depend on the facts and circumstances of each case. In the event that a party (for example a local authority) believed a provision in extant subordinate legislation to be incompatible with the Charter, this would most likely be raised in

pre-action correspondence in which Scottish Ministers would be invited to rectify the alleged incompatibility. If they did not and matters proceeded to court, the judicial review petition could then include arguments that Ministers' failure to respond amounted to a breach of the section 2 statutory duty (which includes a failure to act). If the court agreed, it could then "reduce" (quash) the instrument and/or order Ministers to rectify this failure (by making correcting subordinate legislation).

These are powers that are already available to the Court of Session when disposing of a petition for judicial review. The proposed addition to the Explanatory Notes would simply seek to explain how they may apply in this particular scenario, as a result of the Bill.

As I explained in my evidence to the Committee, in my view there is unlikely to be extensive litigation as a result of the Bill. Judicial review is an expensive process. It is not something a party would enter into lightly and is only likely to happen after all other avenues had been exhausted.

Nevertheless, it is important that the mechanics of the Bill are understood and having realised that this particular scenario was not covered by the Explanatory Notes, it seemed appropriate to rectify that, and to inform the Committee of my intention to do so, in the event that the Bill passes.

Best wishes

Andy Wightman MSP